

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA**

IN RE: APPLE iPhone 3G AND 3GS  
“MMS” MARKETING AND SALES  
PRACTICES LITIGATION

THIS DOCUMENT RELATES TO:  
Meredith Goette and Sabrina Storner  
E.D. Missouri. Case No. 4:09-cv-1480  
(eliminating Plaintiff Goette, and adding  
as additional Plaintiff Paige Lierman)

MDL NO. 2116  
2:09-md-2116  
SECTION: J  
JUDGE BARBIER  
MAG. JUDGE WILKINSON

**FIRST AMENDED AND SUPPLEMENTAL COMPLAINT**

Plaintiff, by and through their undersigned counsel, individually and on behalf of all others similarly situated, for their First Amended and Supplemental Complaint against Defendants, which fully supplements and amends the Original Complaint filed in the Eastern District of Missouri. [09-1480 (E.D.MO.)], on information and belief, and personal knowledge,

states as follows:

**NATURE OF THE CASE**

1. Plaintiffs, on behalf of themselves and certain purchasers of iPhone 3G and 3GS cellular telephones, as further defined below, bring this consumer rights class action against Defendants, Apple, Inc. (“Apple”) and AT&T Mobility, LLC (“AT&T”).

2. Since 2007, Apple and AT&T co-marketed the iPhone with AT&T's wireless network service. As a result of Defendants' "exclusivity agreement," when purchasing an iPhone during the Class Period, Defendants required all Class Members to obtain wireless service, including messaging plans, for their iPhones exclusively from AT&T.

3. On or around the time the Defendants began their launch of the new generation of the 3G iPhones, text messaging was a standard feature of mobile phones and extremely popular. The text messaging medium known as Multimedia Messaging Service or MMS allowed cellular users to send photos and videos to other phone users using the phone's text messaging function and without having to be connected to an Internet service. Texting is a faster, easier, and less expensive way to communicate between consumers than traditional email. All other phones on AT&T's network that had cameras offered this popular feature to text photos.

4. Plaintiffs are informed and believe that around the time that the Defendants launched the 3G iPhone, it became obvious to Defendants that there was a problem with the ability of the AT&T cellular network to handle the large amount of data transmitted when sending photos or video via text message. Sending pictures by text took considerably more capacity than sending a written text message, and AT&T realized that its entire network would be overloaded if millions of new iPhone users began texting pictures on the 3G iPhone.

5. AT&T needed to build up its network to support this new capacity and that would take time. Defendants knew that consumers would expect that the iPhone, a

“revolutionary product” with a superior camera and picture quality, would be able to text pictures. Defendants did not want to lose market share by announcing that this feature would not be available and did not want to delay the lucrative launch of the new generation of 3G iPhones and thus, lose out on the extra revenue from millions of additional customers who had to lock into AT&T’s exclusive contract for service.

6. AT&T’s network was unable to provide the service of texting pictures until it upgraded its network and therefore, the Apple iPhone 3G and 3GS phones could not, contrary to almost all other phones on the market, text or receive pictures from other phones.

7. AT&T made a decision to let all of its customers, except iPhone customers, have access to its network to text pictures. AT&T promoted and sold unlimited texting plans to all its customers, called “Messaging Unlimited” which gave its customers the ability to send unlimited messages to any wireless phone in the United States for \$19.99 per month. Promoting its Messaging Unlimited MMS capabilities, AT&T advertised and represented to consumers, including Plaintiffs, that its Messaging Unlimited plan **“included text, picture, video and IM.”** AT&T also offered unlimited “Family Plans” for \$30.00 per month. While AT&T allowed customers other than iPhones users to text pictures, AT&T intentionally barred iPhone users from having the same ability given its network limitations. However, AT&T continued to charge the iPhone users for that service and represented to the iPhone users that the service included pictures.

8. For Apple’s part, it covered up the “problem” with an intentionally misleading advertising campaign. Specifically, Apple never disclosed to consumers that

they had to pay for the picture messaging under the unlimited plans from their exclusive provider, AT&T, even though they would not have that service. Moreover, Apple made affirmative representations that such a service was available on the iPhone, including large in-store videos showing people texting pictures with small, fine print disclosures about when the service was available, intentionally designed so that consumers would not see or understand them. Apple purposely emphasized the texting of photos using the iPhone while concealing the disclosure that the service was unavailable to iPhone users from its exclusive network service provider.

9. Defendants' marketing campaign promoted the iPhone operating on AT&T's 3G network by promising the latest in mobile technology capable of everything other mobile devices could do, including MMS and much more. Despite these promises, the iPhone's MMS function was knowingly and consciously disabled while, at the same time, Defendants' advertised that MMS was a feature included with the iPhone 3G and 3GS and AT&T's messaging service plans.

10. MMS was and is commonly available on many phones and mobile networks, including AT&T's. However, the function was purposely disabled for iPhone users. Even though the function was purposely disabled for iPhone users including the Plaintiff and Class Members, AT&T charged Class Members the same price as customers with non-iPhone cellular phones that were provided with fully functional MMS. That is, despite advertisements to the contrary, Class Members paid for something they did not receive.

11. AT&T breached its contracts with Plaintiffs and the Class by charging for and receiving payment for the MMS feature and service that they did not provide, and they have otherwise been unjustly enriched at the expense of Plaintiffs and the Class Members.

12. Defendants each engaged in conduct that is likely to deceive and has deceived the public through (1) omission, suppression and concealment from the public of material facts related to the iPhone 3G and 3GS mobile phones' MMS features and the AT&T messaging plans, and (2) making and disseminating or causing to be made or disseminated untrue and/or misleading statements that were known, or by the exercise of reasonable care should have been known, to be untrue or misleading.

### **PARTIES**

13. Plaintiff Sabrina Storer is a resident of Belleville, Illinois. On March 14, 2009, Storer purchased an iPhone 3G from an AT&T store in Kirkwood, MO in St. Louis County, Missouri, which is within the Eastern District of Missouri. She also purchased a Messaging 200 text messaging service plan. At the time she purchased her iPhone 3G and AT&T messaging service, Storer expected that the iPhone would have the ability to text pictures and specifically was charged for a texting plan that AT&T represented included texting pictures, when in fact it would not.

14. Plaintiff Paige Lierman is a resident of Chesterfield, Missouri. In approximately the first week of July 2009, Lierman purchased an iPhone 3GS from an Apple store at West County Mall in St. Louis County, Missouri, which is within the Eastern District of Missouri. She also purchased an unlimited text messaging service

plan. At the time she purchased her iPhone 3GS and AT&T messaging service, Lierman expected that the iPhone would have the ability to text pictures and specifically was charged for a texting plan that AT&T represented included texting pictures, when in fact it would not.

15. Prior to purchasing the iPhone 3G, Storer owned a Katana II phone from Sprint. Upon purchasing the iPhone 3G, Storer reasonably expected that the newer iPhone model would have the capacity and ability to send picture messages. Prior to purchasing the 3GS, Lierman owned a Blackberry from T-Mobile. Upon purchasing the 3GS, Lierman reasonably expected that the newer iPhone model would have the capacity and ability to send picture messages. The ability to send a picture by text message was a material part of the purchase of the iPhone to Storer and Lierman.

16. Storer and Lierman would not have purchased the iPhone if they had known that picture messaging was not available at the time of purchase. Storer and Lierman reasonably relied upon the representations by Apple and AT&T and their general understanding of the “revolutionary” nature of the iPhone 3G and 3GS to form their belief that the iPhone 3G and 3GS had the ability to send picture messages by text.

18. After Storer and Lierman purchased the iPhone and signed up for a messaging plan, they learned that their iPhone 3G/3GS did not have the capacity to send pictures by text message. Storer attempted to receive picture messages on April 11, 2009, May 11, 2009, May 29, 2009, July 4, 2009, and August 12, 2009 and was directed to [www.viewmymessage.com](http://www.viewmymessage.com) to receive the photos. Her MMS did not work. Since the

time picture messaging finally became available to iPhone users, Storner and Lierman have regularly sent pictures each month with their iPhones.

19. Storner and Lierman each purchased the iPhones primarily for personal, family, or household use.

20. Storner and Lierman have suffered injury in fact and have lost money as a result of the Defendants' unfair competition and unlawful conduct because *inter alia* they paid more for an iPhone than they should have paid and were charged and paid for a service they did not receive.

21. Defendant AT&T Mobility, L.L.C. (AT&T) is a Delaware limited liability corporation with its principal place of business in Atlanta, Georgia. AT&T is one of the largest wireless network companies in the world, with roughly 80 million wireless subscribers and \$124 billion in revenue in fiscal 2008.

22. Defendant Apple, Inc. (Apple) is a California corporation with its principal place of business in Cupertino, California. Apple is a personal computing and digital media distribution company. Its products include Mac computers, iPod digital music players, iTunes online music store, and iPhone mobile devices. Apple generated \$32 billion in revenue in fiscal 2008.

23. Defendants each participated in advertising campaigns designed to promote the iPhone 3G and 3GS so that consumers believed they were capable of texting photos or had an MMS feature and MMS included in the messaging plan. At the same time, AT&T promoted its messaging plan so that consumers who purchased the iPhone 3G and

3GS believed texting photos or MMS was included in the price being charged for the messaging plans.

### **JURISDICTION AND VENUE**

24. The amount in controversy in this action, as defined by 28 U.S.C. § 1332(d)(6), exceeds \$5,000,000 exclusive of costs and interest and some Members of the Class and Sub-Class are citizens of a state different from a defendant.

25. This case, originally filed in state court in Missouri and removed to the Eastern District of Missouri, was transferred to this court as part of a Multi-District Litigation proceeding pursuant to 28 U.S.C. Sec. 1407.

### **COMMON FACTS**

This section sets forth Defendants' specific representations and omissions described above as part of the conduct of AT&T charging for a service it did not provide and by the deceptive marketing practices of Apple and AT&T.

26. Defendants Apple and AT&T each promoted and advertised the iPhone and AT&T's messaging plans. To maximize profits, Apple would manufacture the iPhones and AT&T was the exclusive network upon which the iPhone would operate including the exclusive provider of messaging service plans for the iPhone, for which AT&T charges its customers more money than a basic phone service or phone and data service plan.



27. AT&T is one of the largest cellular service providers and relies upon its exclusive right to sell the iPhone to help maintain its position among cellular service providers.

28. In January 2007, Apple announced the creation of a new mobile phone, claiming that it “reinvented the phone” and offered “revolutionary” features. The new phone was called the iPhone. From its launch in 2007 to the present, Defendants have sold iPhones from their stores and websites.

29. The iPhone is a high-end mobile device, capable of making telephone calls, accessing the Internet, taking photographs, operating as a digital music player, and sending and receiving other popular messaging formats, such as MMS.

30. MMS provides added benefits to the consumer, including advantages over email; No separate charge for a data plan for e-mail service is required; MMS allows consumers to make full use of the cell phones’ camera and video functions and then send the pictures or video utilizing the mobile phone number. Sending text, pictures and videos via a mobile phone’s messaging function is faster and simpler; and MMS’s can be sent to and from most mobile phones, even those that do not have email functionality.

31. In an effort to continue building demand for the popular iPhone, following the launch of the iPhone 2G on June 29, 2007, in October of 2007, AT&T continued marketing its Messaging Unlimited plan by airing television commercials, that conveyed the same message that its messaging plans allowed customers to send text, pictures and videos over their phones. Typical of the television commercials, is one that featured a mother scolding her children and their grandmother for sending

thousands of text messages in a month. The announcer then cuts in stating, “Now get a texting plan the whole family can N-J-O-Y. AT&T brings your family unlimited messaging to anyone on any network.” An orange screen appears showing in large bold print, “UNLIMITED MESSAGING” with words, “Text, Picture, Video, IM” below.

32. This well orchestrated and omnipresent marketing plan led to significant demand for the iPhone and messaging plans. In July 2008 Defendants started selling the next generation iPhone, the iPhone 3G.

33. The iPhone 3G name was taken in part from the new and improved 3G cellular service networks. The 3G network offered significant advantages over the 2G network. 3G or 3rd Generation, is a family of standards for mobile telecommunications defined by the International Telecommunication Union, which includes GSM EDGE, UMTS, and CDMA2000 as well as DECT and WiMAX. Services include wide-area wireless voice telephone, video calls, and wireless data, all in a mobile environment. Compared to 2G and 2.5G services, 3G allows simultaneous use of speech and data services and higher data rates (up to 14.0 Mbit/s on the downlink and 5.8 Mbit/s uplink ). Thus, 3G networks enable network operators to offer users a wider range of more advanced services while achieving greater network capacity through improved spectral efficiency.

34. In anticipation of the launch of the iPhone 3G, in June 2008, AT&T announced its “iPhone 3G pricing plans,” which were the same plans offered to all of its customers, including those without the iPhone. All of AT&T’s plans that are

relevant here require customers to enroll with AT&T for a period of years or face steep “early termination fees.” These plans expressly included “texting plans.” AT&T offered all of its customers a choice between a \$20 per month “unlimited” individual plan or a \$30 per month “unlimited” family plan. All AT&T customers who purchased one of these texting plans paid for and received MMS, except iPhone 3G customers, who paid for, but did not receive MMS. In other words, just like all other wireless service providers, AT&T sold the MMS service in a “bundle” with text messaging, where both messaging formats are included for a fixed price each month.

35. From the introduction of the iPhone 3G in July of 2008 through June 27, 2009, Apple sold over 20 million iPhones, with AT&T being the exclusive provider of the mobile network and messaging plans.

36. The iPhone 3G was a financial bonanza for Apple and AT&T. In October 2008, Apple CEO Steve Jobs announced that based on revenue, Apple had become the third-largest mobile phone supplier in the world.

37. Only after the launch of the iPhone 3G in July 2008, did AT&T publish a statement in the AT&T Answer Center page of its website acknowledging problems related to MMS:

Customers who are sent a MMS message and own a non-MMS capable device will receive a text message instead of an actual MMS message. The message will contain the website address of [www.viewmymessage.com/1](http://www.viewmymessage.com/1) or [www.viewmymessage.com/2](http://www.viewmymessage.com/2) as well as a user name and password. To view the MMS message, please access the website from a computer and enter the user name and password provided in the text message.

38. AT&T was instructing customers interested in MMS to access a website from a computer to view a message sent from one mobile phone to another mobile phone, which negated the whole purpose of purchasing a phone and message plan that supposedly included MMS capabilities.

### 3GS

39. The most recent version of the iPhone, launched in June 2009, is called the “3GS.” The iPhone 3GS sold over one million units in its first three days on the market, which included the best sales day in Apple history.

40. In the spring of 2009, Apple and AT&T each initiated an advertising campaign to sell its older 3G models in preparation for the launch of 3GS. Following the previous formula of falsely advertising MMS capabilities and messaging plans that included MMS, in March of 2009 Defendants began promoting the iPhone 3GS claiming it had a MMS feature. On March 17, 2009, Apple issued a press release relating to the iPhone 3GS, which stated in part, “The new iPhone OS 3.0 software will be available to iPhone...users this summer with over 100 new features including...MMS to send and receive photos....” That same press release states that “MMS available only on the iPhone 3G....” which was false and misleading.

41. On March 17, 2009, Apple gave a presentation to the media about the upcoming release of the new 3GS, including a video presentation by Scott Forstall, Apple’s Senior VP for iPhone software, where he stated, “But the big news for the messages application is we’re adding support for MMS. So this, this is support for

multimedia, you can now send and receive photos...so now you have one app to send and receive text, photos...That is what we're doing with messages.... Several minutes later, Mr. Forstall says, "messages now support for MMS." This too was false and misleading.

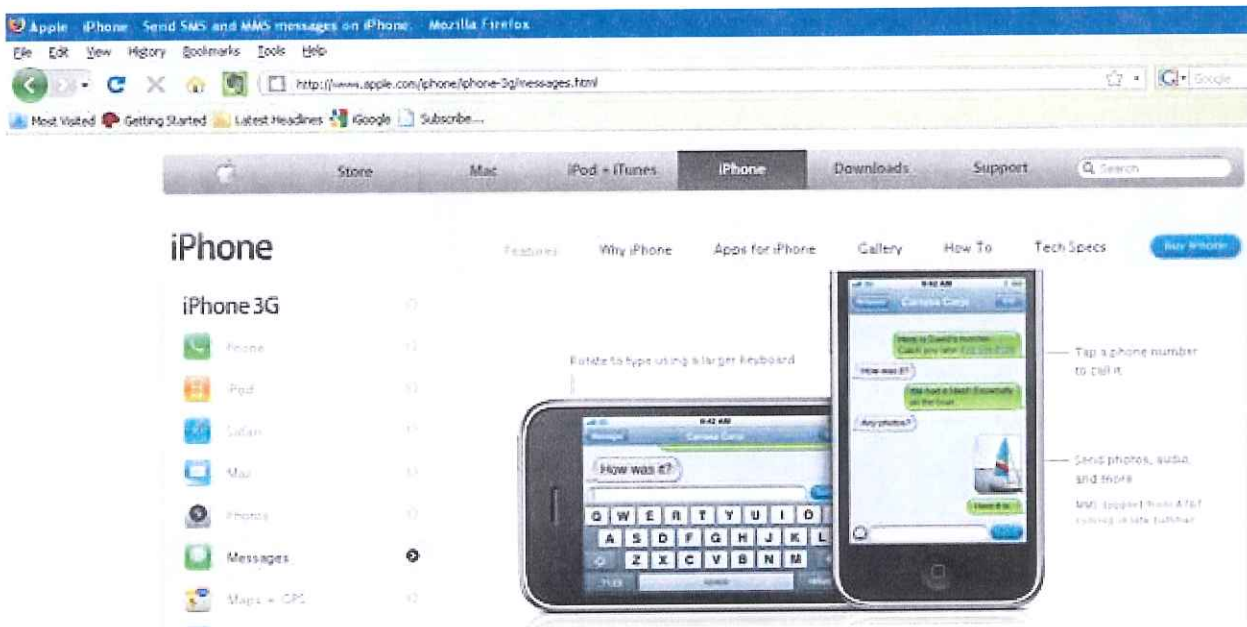
42. While Apple was promoting the 3GS's MMS feature, AT&T continued marketing its messaging plans claiming they included MMS capability, when, in fact, that was not the case for its current 3G users and was not going to be the case for the new 3GS purchasers.

43. On June 8, 2009, a new customer of AT&T and Apple was able to purchase the iPhone 3G at a greatly reduced price. As part of the false advertising campaign, the Apple packaging that came with the iPhone 3G claimed the availability of MMS, with no reference to the service not being available until late summer. This packaging insert was also false and misleading.

44. On June 10, 2009, AT&T continued to falsely promote the iPhone and its messaging service by advertising on its website, without any late summer disclaimer, that the iPhone 3GS had MMS functionality.

45. Likewise, furthering this false advertising campaign to promote the iPhone and messaging plan, Apple posted on its website, on the "iPhone OS 3.0 Software Update" page, that MMS would be available, so that customers could "send MMS messages and include photos, audio, and contact info. Even tap to snap a picture right inside Messages." A graphic showed the iPhone text message bubbles with a picture inserted.

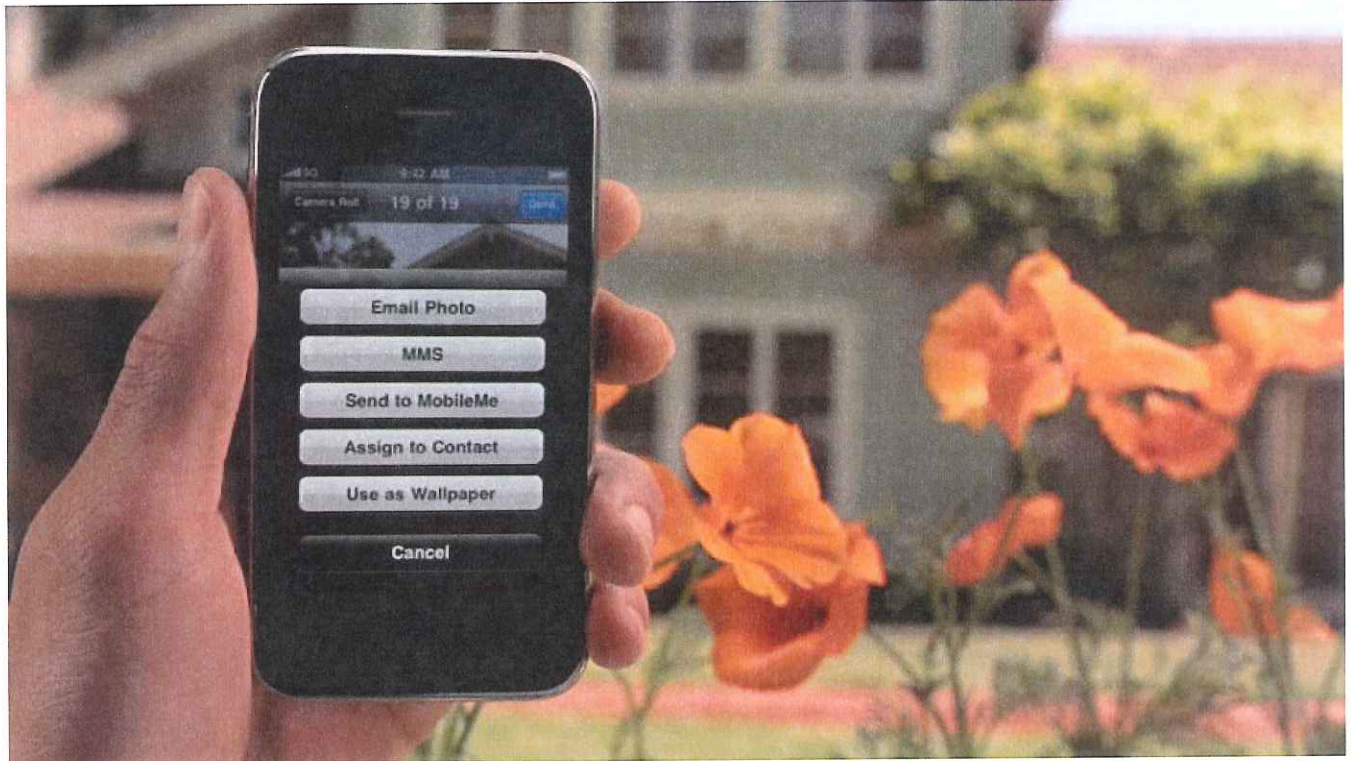
46. At certain times during the Class Period, a similar graphic appeared on Apple's website promoting the iPhone 3G and its ability to "send photos, video, audio and more" with a mouse print-sized disclaimer indicating "MMS Support from AT&T coming in late summer."



47. At certain times during the Class Period, both Apple and AT&T had in-store displays and/or videos that showed the iPhone 3G&S phones sending photos via text messaging. AT&T stores had seven foot-tall white Apple kiosks, which showed a continuously rolling video demonstrating all the features of the iPhone 3GS, including a specific section about MMS demonstrating someone sending a video of kids playing on the beach and sending a picture of a sailboat via MMS.

48. The false advertising regarding the MMS feature and messaging service plan was also reinforced by Apple's Guided Tour for the 3GS. This Guided Tour has an

entire section devoted to the iPhone's camera and claims that the user can "MMS" pictures:



49. Then, several minutes later in Apple's Guided Tour for the 3GS, there is a section devoted to MMS where the announcer claims that the "messaging application on iPhone 3GS now supports MMS."



50. On its website, Apple represented the following at certain times during the

Class Period:

### *Send MMS*

*Take a photo or shoot some video, then send it via Messages. You can also send audio recordings from Voice Memos, contact information from Contacts, and locations from Maps.*

51. At certain times during the Class Period, a Pop-Up window on Apple's

website read:

### *Sharing Photos and Videos*

*You can take a photo or make a video (iPhone 3 GS only) from within Messages and include it in your conversation with another MMS-capable device.*

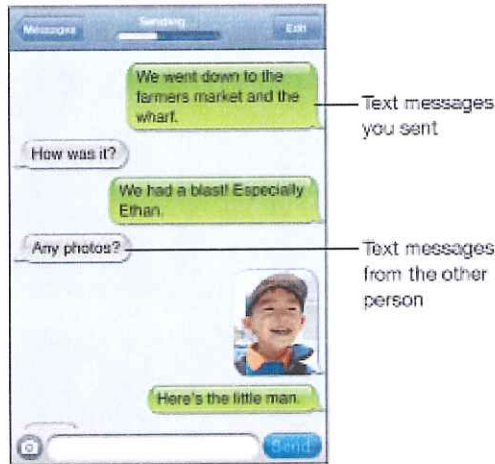
52. On its website AT&T represented the following at certain times during the

Class Period:

### Messages

*Use messages to send text, photos, audio, video, and more. Forward a whole message or just the important parts.*





53. As a direct result of relying upon the false and deceptive representations and omissions in Defendants’ advertisements and promotions, millions of customers, including the named Plaintiffs herein, purchased the 3G and 3GS, reasonably expecting to have the ability to send and receive MMS messages on their iPhone 3Gs and 3GSs.

54. Contrary to Defendants’ advertising claims, AT&T’s iPhone mobile phone messaging service did not support MMS during the Class Period.

55. In furtherance of this false advertising, on July 21, 2009, a month after the launch of the 3GS, Apple held an Investors Conference Call. Apple mentioned the availability of MMS (incorrectly stated it was “MMF”). During the Investors Conference Call Apple mentioned nothing about MMS not being available until late summer.

56. Regardless of whether consumers purchased their iPhone 3G or 3GS from Apple or AT&T, the purchase of an iPhone requires a two-year contract for service

through AT&T. The iPhone cannot be used on any other mobile phone service network in the United States.

57. Regardless of the particular iPhone purchased, the same basic pricing plans exist for all iPhones. For messaging, individual plans through AT&T charge \$20 per month for Messaging Unlimited, \$15 per month for Messaging 1500, and \$5 per month for Messaging 200. Family Plans charge \$30 per month (per phone) for Messaging Unlimited.

58. At various times during the Class Period, AT&T's invoices and account statement summaries specifically indicated that "Multimedia Messaging" or MMS was included in the messaging packages purchased by certain Class Members.

59. For example, one of the Class Plaintiffs received statements for the billing periods 07/15/2009-8/14/2009 and 8/15/2009-9/14/2009 that indicated MMS was included in his messaging plan. Specifically, the portion of the statements for the "FAMILY MSG UNLIMITED" plan stated that it "Includes: Multimedia Messaging Text Messaging".

Wireless Data				
DATA PLAN IPHONE	08/15-09/14		30.00	30.00
FAMILY MSG UNLIMITED	08/15-09/14		30.00	30.00
Includes:				
Multimedia Messaging				
Text Messaging				
MEDIA MAX UNL MNET	08/15-09/14		0.00	0.00
Includes:				
DATA ACCESS				
DATA ACCESS				
<b>TOTAL MONTHLY SERVICE CHARGES</b>				<b>\$140.99</b>

60. At least 12 other AT&T mobile phones provided MMS as part of the messaging bundles during the Class Period. The AT&T mobile phone network had

the capacity to support MMS services during the Class Period, and AT&T provides MMS to non-iPhone customers. However, AT&T did not provide MMS to any iPhone customers during the Class Period despite charging them the same rates for their messaging bundles.

61. During the Class Period, AT&T charged iPhone customers the same price for messaging bundles per month, as represented in the iPhone customers' invoices that stated that the charge for messaging included MMS, but failed to provide the MMS portion of the messaging service - even though it provided this service to all other AT&T mobile phone customers with MMS-capable telephones for the same price it was charging the iPhone customers who were not provided the MMS service. Specifically, for every other AT&T mobile phone, Messaging Unlimited, Messaging 1500, and Messaging 200 are the exact same prices, respectively, as the Messaging Unlimited, Messaging 1500, and Messaging 200 charges for iPhone customers.

62. During the Class Period through advertising campaigns, Apple and AT&T each misrepresented and/or concealed, suppressed, or omitted material facts to and from customers about the fact that MMS was not an available feature on the iPhone 3G and 3GS. Further, iPhone users had to pay for MMS if they wanted unlimited AT&T messaging plans.

## CLASS ACTION ALLEGATIONS

63. Plaintiffs bring this action pursuant to Fed. R. Civ. P. 23(a), (b) (1) and (b)

(3) on behalf of the following Class:

All United States residents who purchased an iPhone 3G or 3GS from AT&T Mobility L.L.C. or Apple, Inc. from July 11, 2008 to September 25, 2009, primarily for personal, family, or household use. Excluded from the Class are any judicial officers presiding over this action, and defendants, including their officers, directors and employees.

This Class includes the following Sub-Class:

All Missouri residents who purchased an iPhone and a text messaging plan from AT&T from July 11, 2008 to September, 2009, primarily for personal, family, or household use. Excluded from the Sub-Class are any judicial officers presiding over this action, and defendants, including their officers, directors and employees.

64. The Class and Sub-Class are sufficiently numerous because they are comprised of millions of consumers, the joinder of which is not practicable.

65. There are questions of law and fact that are common to the proposed Class and Sub-Class, including, but not limited to, the following:

- a. Whether the Defendants each advertised the iPhone 3G and 3GS as having the ability to text pictures;
- b. Whether the Defendants each advertised that the messaging plans included the ability to text pictures;
- c. Whether the Defendants each charged Plaintiffs, the Class and Sub-Class for a phone that could text pictures when it did not;

- d. Whether Defendants each charged Plaintiffs, the Class and Sub-Class for messaging service plans that that could text pictures when they did not;
- e. Whether Defendants' conduct is unlawful, unfair, or fraudulent;
- f. Whether Defendants each engaged in unfair, deceptive, untrue or misleading advertising;
- g. Whether Defendants' conduct is unfair, misleading or tends to mislead;
- h. Whether Defendants each intended the public to be misled into believing that the iPhone 3G and 3GS mobile phone had the ability to send and receive pictures by text message;
- i. Whether Defendants' conduct is in violation of the Missouri Merchandising Practices Act;
- j. Whether Defendants' conduct is in violation of the consumer protection laws of other states; and
- k. Whether the Class and Sub-Class are entitled to monetary relief, including damages, and the proper measure of that relief.

66. The money lost by Plaintiffs or individual Members of the Class or Sub-Class are relatively small when compared to the expense of litigating the legal and factual issues raised by this lawsuit. As a result, unless this case proceeds as a class action, Plaintiffs and the Class Members will, as a practical matter, be unable to pursue their

individual claims. Thus, certification of this case as a class action is the only fair and efficient method for the adjudication of this controversy.

67. Plaintiffs and their counsel do not envision any unusual difficulty in the management of this action as a class action.

68. The common questions set forth above predominate over any issues affecting only individual Class Members.

69. Plaintiffs' claims are typical of the claims of the Members of the Class and Sub-Class, as all such claims arise from the purchase of the iPhone 3G or 3GS and the messaging plans Plaintiffs purchased from AT&T.

70. Class treatment is a superior method for the fair and efficient adjudication of the controversy in that such treatment will permit a large number of similarly situated persons to efficiently prosecute their common claims without the duplication of evidence, effort and expense that would arise from individual actions.

71. Plaintiffs will fairly and adequately represent the interests of the Members of the Class and Sub-Class. Plaintiffs' interests are the same as, and not in conflict with, the other Members of the proposed Class and Sub-Class. Plaintiffs' counsel is experienced in handling class actions and complex litigation.

## COUNT I

**(Missouri Merchandising Practices Act, Rev. Stat. Mo. Secs. 407.025 and 407.020)**

72. Plaintiffs reincorporate and reallege Paragraphs 1 through 71 as if more fully set forth herein.

73. *Rev. Stat. Mo. Sec. 407.020* provides as follows:

**407.020.** 1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice. The use by any person, in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri of the fact that the attorney general has approved any filing required by this chapter as the approval, sanction or endorsement of any activity, project or action of such person, is declared to be an unlawful practice. Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

74. *Rev. Stat. Mo. Sec. 407.025.1* and *407.025.2* provide as follows:

**407.025.** 1. Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action in either the circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place, to recover actual damages. The court may, in its discretion, award punitive damages and may award to the prevailing party attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper.

2. Persons entitled to bring an action pursuant to subsection 1 of this section may, if the unlawful method, act or practice has caused similar injury to numerous other persons, institute an action as representative or representatives of a class against one or more defendants as representatives of a class, and the petition shall allege such facts as will show that these persons or the named defendants specifically named and served with process have been fairly chosen and adequately and fairly represent the whole class, to

recover damages as provided for in subsection 1 of this section. The plaintiff shall be required to prove such allegations, unless all of the members of the class have entered their appearance, and it shall not be sufficient to prove such facts by the admission or admissions of the defendants who have entered their appearance. In any action brought pursuant to this section, the court may in its discretion order, in addition to damages, injunction or other equitable relief and reasonable attorney's fees.

75. In the marketing of the iPhone 3G and 3GS and messaging bundled service plans, as set forth throughout this Amended Complaint, Defendants have engaged in deception, fraud, false pretense, false promise, misrepresentation, and unfair practice, as well as the concealment, suppression, and omission of material facts in connection with the sale or advertisement of any merchandise in trade or commerce.

76. Specifically, Defendants concealed, suppressed, and omitted the following material facts in connection with the sale and advertisement of 3G and 3G-S iPhones to consumers in Missouri:

(a) AT&T had not upgraded its network sufficiently to handle MMS, and therefore MMS would be unavailable on iPhones until the network was sufficiently upgraded;

(b) AT&T would not have the network upgraded for many months; and

(c) the 3.0 Software Upgrade would not, by itself, solve the problem and make MMS available.

76. Defendants employed, in connection with the sale and advertisement of 3G and 3G-S iPhones, to Missouri consumers, deception, fraud, false pretense, false promise, misrepresentation, and unfair practices, including but not limited to representing that the



phones would have MMS capability when Defendants knew, in fact, that they would not have such capability, and further representing that their messaging plans would include MMS when, in fact, they would not.

77. At the time Plaintiffs purchased their iPhones, all phones with cameras had the ability to text pictures. Defendants marketing campaign and sales promotions were likely to deceive Plaintiffs and the Class so that they reasonably would believe that the iPhone, as the leader in graphics and with the best camera on the market, could text a picture. Defendants failed to disclose that they would not allow Plaintiffs to text pictures because AT&T's network would be over-burdened. Further, Plaintiffs were charged by AT&T and paid for messaging plans that included the ability to text pictures and video, but did not receive what they paid for.

78. Although proof of reliance is not required for a claim under the MMPA, Plaintiffs Storer and Lierman in fact relied on representations made in Defendants' uniform campaign of untrue and/or misleading marketing when choosing to purchase an iPhone 3G, 3GS and messaging plans as set forth above. Plaintiffs purchased 3G and 3GS iPhones and messaging service plans under the impression that they would be able to text pictures. During the Class Period, Class Members and Plaintiffs continued to pay for messaging bundles at the same rates (for concomitant packages) that AT&T charged customers whose wireless plans did, in fact, provide the ability to text pictures, while the Plaintiffs did not. After AT&T allowed iPhone users to text pictures, Plaintiffs and Class Members were still charged and continued to pay the exact same rate for their messaging bundles and/or packages. By the conduct alleged above, Defendants have each engaged

in a scheme to cheat a large number of consumers out of individually small sums of money.

79. As a direct result of the deceptions, frauds, false pretenses, misrepresentations, unfair practices, concealments, suppressions, and omissions of Defendants, Plaintiffs have suffered an ascertainable loss of money, namely the difference in value between the iPhone 3G&S as represented and the iPhone 3G&S as it actually exists, as well as the amounts paid for messaging texting plans which did not allow MMS as promised.

80. Moreover, Defendants actions were intentional and outrageous, without any justification or excuse, and warrant the imposition of punitive damages under the MMPA.

81. In the event Plaintiffs are the prevailing parties, Plaintiffs also seek a reasonable attorney's fees and costs under the MMPA.

82. If the Court determines that California law should not be applied to Defendants Apple and/or AT&T with respect to all Class Members, this count is alternatively brought pursuant to Missouri law for the portion of the Class and Sub-Class and/or with respect to particular Defendants for which this Court determines Missouri law is applicable and the concomitant consumer protection laws of other states for the remainder of the Class and Sub-Class claims against particular Defendants.

## COUNT II

### **(Breach of Contract Against AT&T Only —Messaging Plans)**

Plaintiffs Storner and Lierman, by and through their undersigned counsel, individually and on behalf of all others similarly situated, and for Count II of their Complaint against AT&T, state as follows:

83. Plaintiffs incorporate paragraphs 1 through 82 by reference, as though fully set forth herein.

84. Defendant AT&T required Plaintiffs and Class Members to enter into an agreement for wireless service in exchange for the “privilege” of purchasing an iPhone. Specifically, Plaintiffs and Class Members were required to enter into an exclusive two year wireless service agreement with AT&T. The iPhone was forbidden from being used on any other wireless carrier’s network. Part of that two year service agreement for Class Members included the purchase of messaging plans which were marketed and sold both as “unlimited messaging” and as messaging bundles.

85. Plaintiffs and Class Members performed all conditions, covenants, and promises required by them on their part to be performed in accordance with the terms and conditions of the agreement.

86. Defendant AT&T expressly and/or impliedly promised Plaintiffs that the iPhone 3G and 3GS messaging plans included the ability to send pictures by text message. This feature is and has been at various times referred to as “picture messaging” “texting a picture” and by its more technical term – MMS.

87. Defendant AT&T both explicitly and implicitly promised to provide the ability for iPhone users who purchased messaging plans and bundles (whether purchased as a “messaging unlimited” plan or purchased in finite numbers of messages) the ability to send picture messages. AT&T charged the same price for each of its messaging plans and bundles to iPhone users as it charged to all other wireless service subscribers with non-iPhone cellular phones that had fully functional MMS.

88. All other AT&T wireless customers were provided the picture messaging functionality for the same price charged to iPhone customers of AT&T. iPhone users were denied this ability and functionality despite paying for it. AT&T charged for this function knowing that during the Class Period AT&T could not and/or would not provide picture messaging with the iPhone 3G or 3GS and messaging plans.

89. In return for this promise, Plaintiffs and Class Members paid AT&T for messaging plans reasonably expecting these plans to include the ability to send picture messages.

90. AT&T breached the agreement by failing to provide messaging service plans that included the ability to send picture messages during the Class Period.

91. As a result of Defendants’ breach of the agreements with Plaintiffs and Class Members, Plaintiffs and the Class Members suffered damages to be determined according to proof at the time of trial.

### **COUNT III**

#### **(Breach of Contract Against Defendants—Purchase of iPhone)**

Plaintiffs Storner and Lierman, by and through their undersigned counsel, individually and on behalf of all others similarly situated, and for Count III of their Complaint against Defendants, state as follows:

92. Plaintiffs incorporate paragraphs 1 through 91 by reference, as though fully set forth herein.

93. Defendants each expressly and/or impliedly promised Plaintiffs that the iPhone 3G and iPhone 3GS and the messaging plans included MMS.

94. In return for this promise, Plaintiffs paid the Defendants for iPhones and messaging plans that were to include MMS.

95. Defendants each breached the contract by failing to provide iPhones and messaging service plans that included MMS.

96. As a result of Defendants' breach of contract, Plaintiffs and the Class Members suffered damages to be determined according to proof at the time of trial.

### **COUNT IV**

#### **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

Plaintiffs Storner and Lierman, by and through their undersigned counsel, individually and on behalf of all others similarly situated, and for Count IV of their Complaint against Defendants, state as follows:

97. Plaintiffs incorporate paragraphs 1 through 96 by reference, as though fully set forth herein.

98. The contract between Plaintiffs and Defendants included an implied covenant of good faith and fair dealing.

99. Defendants each breached this implied covenant in the contract when, in bad faith, they promised to provide an iPhone and messaging service plan that included MMS, charged for that functionality, knowing that during the Class Period they could not and/or would not provide MMS with the iPhone 3G, 3GS and messaging plans.

100. As a result of each Defendants' breach of the implied covenant of good faith and fair dealing, Plaintiffs and the Class Members suffered damages to be determined according to proof at the time of trial.

#### **COUNT V**

##### **(Breach of Express Warranty)**

Plaintiffs Storner and Lierman, by and through their undersigned counsel, individually and on behalf of all others similarly situated, and for Count V of their Complaint against Defendants, state as follows:

101. Plaintiffs incorporate paragraphs 1 through 100 by reference, as though fully set forth herein.

102. Plaintiffs, and each member of the Class and Sub-Class, formed a contract with each Defendant at the time Plaintiffs and the other Class Members purchased the iPhone 3G, 3GS and messaging plans that were to include MMS functionality, but did not.

103. The terms of that contract include the promises and affirmations of fact made by Defendants on the iPhone and AT&T labels, packaging materials, websites,

advertisements and/or press releases, all of which created or constituted express warranties that became part of the basis of the bargain and part of a standardized contract between Plaintiffs and the Class Members on the one hand, and Defendants on the other.

104. All conditions precedent to Defendants' liability under this contract have been performed by Plaintiffs and the Class and Sub-Class.

105. Defendants each breached the terms of this contract, including the express warranties, with Plaintiffs and the Class Members by not providing an iPhone 3G, 3GS and messaging service plans that included MMS.

106. As a result of Defendants' breach of their contract and warranties, Plaintiffs and the Class Members suffered damages to be determined according to proof at the time of trial.

## **COUNT VI**

### **(Unjust Enrichment)**

Plaintiffs Storner and Lierman by and through their undersigned counsel, individually and on behalf of all others similarly situated, and for Count VII of their Complaint against Defendants, state as follows:

107. Plaintiffs incorporate paragraphs 1 through 106 by reference, as though fully set forth herein.

108. By their deceptive, misleading and unlawful conduct alleged herein, Defendants unjustly received a benefit at the expense of Plaintiffs and Class Members.

109. It is unjust to allow Defendants to retain the profits from their deceptive, misleading and unlawful conduct alleged herein without providing compensation to Plaintiffs and Class Members.

110. Defendants acted with conscious disregard for the rights of Plaintiffs and Class Members.

111. Plaintiffs and the Class Members are entitled to restitution of, disgorgement of, and/or the imposition of a constructive trust upon, all profits, benefits, and other compensation obtained by the Defendants from their deceptive, misleading and unlawful conduct.

## **COUNT VII**

### **(Alternative Count—Negligent Misrepresentation)**

Plaintiffs Storer and Lierman, by and through their undersigned counsel, individually and on behalf of all others similarly situated, and for Alternative Count VIII of their Complaint against Defendants, in the event the Court finds that the Defendants acts were not intentional as alleged above, then Plaintiffs state as follows:

112. Plaintiffs incorporate paragraphs 1 through 111 by reference, as though fully set forth herein.

113. Defendants misrepresented, concealed, suppressed, or omitted the following material facts in connection with the sale and advertisement of iPhone 3G, iPhone 3GS and messaging plans to Plaintiffs and Class Members:

(i) AT&T had not upgraded its network to support MMS, and, therefore, MMS would be unavailable on iPhones until the network was upgraded;



(ii) AT&T would not have its network upgraded for many months;

(iii) The 3.0 Software Upgrade would not, by itself, solve the problem and make MMS available on the iPhone.

114. Defendants failed to exercise ordinary care in their advertising, marketing, and sale of the iPhone 3G, iPhone 3GS and messaging plans to Plaintiffs, Class Members, and/or the public in general.

115. Defendants breached their duty in representing the functionality and effectiveness of the MMS feature for the iPhone 3G, iPhone 3GS and their associated messaging plans to Plaintiffs, Class Members, and/or the public in general.

116. As a direct result of the deception, misrepresentation, unfair practices, concealment, suppression, and omission by each Defendant, Plaintiffs have suffered an ascertainable loss of money, including, but not limited to the difference in value between the iPhone and messaging plans as represented and the iPhone and messaging plans that Defendants actually provided to Plaintiffs and Class Members.

117. Defendants' actions were negligent, if not intentional, without a justification or excuse.

118. As a direct and proximate result of the foregoing acts and omissions, Plaintiffs and Class Members have suffered damages. Plaintiffs and Class Members are entitled to compensatory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys' fees.

**WHEREFORE**, Plaintiffs pray:

1. That this matter be certified as a class action with the Class and Sub-Class defined as set forth above, that Plaintiffs be appointed Class and Sub-Class Representatives and their attorneys be appointed Class Counsel;
2. That judgment be entered against Defendants for damages, restitution and disgorgement in an amount to be proven at trial; and
3. For other equitable relief or other relief that the Court may deem just and proper, including pre- and post-judgment interest.
4. For attorneys' fees and reasonable costs incurred during the prosecution of this class action.

**DEMAND FOR JURY TRIAL**

Plaintiffs hereby demand a trial by jury.

DATED: June 4, 2010

Respectfully Submitted,

/s/ SCOTT R. BICKFORD  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of June 2010, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system which will send a notice of electronic filing.

/s/ SCOTT R. BICKFORD  
SCOTT R. BICKFORD